

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

VIACOM INT'L INC., ET AL.,

Plaintiffs,

- against -

YOUTUBE, INC., ET AL.,

Defendants.

ECF Case
Civil No. 07-CV-2103 (LLS)

THE FOOTBALL ASSOCIATION
PREMIER LEAGUE LIMITED, ET AL.,
on behalf of themselves and all others
similarly situated

Plaintiffs,

- against -

YOUTUBE, INC., ET AL.,

Defendants.

ECF Case
Civil No. 07-CV-3582 (LLS)

**BRIEF OF THE “SIDESHOW COALITION” AS
AMICUS CURIAE IN SUPPORT OF DEFENDANTS**

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We, members of the Sideshow Coalition¹, submit this *amicus* brief in support of Defendants.

INTEREST OF THE AMICI

We are creative individuals unaffiliated with a major corporation who post original content on YouTube. We call ourselves the “Sideshow Coalition” because Viacom has called us a sideshow.² Viacom apparently considers us marginal and irrelevant because we are not affiliated with major media corporations. We believe, however, that the public wants and values creative expression unmediated and unfiltered by major media corporations. Our work is not simply some distraction to be viewed on the way to the big show. In fact, our videos have collectively been viewed about three billion times – and we are only a few dozen out of millions of users who have posted original content on YouTube.

YouTube is really UsTube. It empowers us to express ourselves, to realize our dreams, to communicate with others, to earn a living from our talents, and to change the world. We are what YouTube is really all about.

We submit this brief because we are concerned that if the Plaintiffs win this lawsuit, YouTube will be forced to change in ways that will make it more like traditional media. If YouTube has to worry about a billion-dollar lawsuit because it is responsible for the content of every video that is posted by its users, it may be forced to undertake the impossible task of manually screening all videos and requiring advance approval. Once that happens, the review

¹ The members of the coalition are David All, Adam Bahner, Michael Bassik, Dane Boedigheimer, Michael Buckley, Chris Cunningham, Iman Crosson, Arin Crumley, Mitchell Davis, Phillip de Vellis, Ronald Erikson II, Benny Fine, Rafi Fine, Jason Fisher, Kassem G, Christine Gambito, Hank Green, John Green, Ian Hecox, William Louis Hyde, Improv Everywhere, Kev Jumba, Salman Kahn, Alan Lastufka, Brian Lustig, Kevin Nalty, Marina Orlova, Anthony Padilla, Byron Pascoe, Mehdi Saharkhiz, Alli Speed, Paul Telner, Charles Trippy, Cory Williams, Dan Zappin, and Barnett Zitron.

² Viacom Opp. Br. 16 (“authorized uses are a sideshow”)

may not be just for copyright infringement but also for any content that might make some major corporation unhappy. This lawsuit could just be the first step in turning YouTube – something new – into another old-fashioned media outlet.

We wish to make clear that we emphatically support the protection of intellectual property. Creating intellectual property is how most of us make a living. Our goal is to assure that everyone has the ability to share and profit from their intellectual property, not just big corporations.

We submit this brief because we believe that in deciding this case, the Court should hear from us directly about what YouTube is really all about. Under the Supreme Court's decision in *Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd.*, 125 S. Ct. 2764 (2005), an important question in this case is whether or not YouTube is primarily used for infringing purposes. It is not. YouTube is not about stealing; it's about creating and expressing. It should remain the extraordinary forum for free expression that it has become.

ARGUMENT

I. YOUTUBE ENABLED US TO DISCOVER AND DEVELOP OUR TALENTS.

YouTube has enabled many of us to discover and develop our talents. Although we posted videos with the hope that someone might see them, we were nonetheless surprised to find how many people wanted to watch our original work. This enthusiasm for our work led us to pursue careers in entertainment.

Adam Bahner³ (aka Tay Zonday) was in graduate school when he posted a video of himself singing his original song "Chocolate Rain." The song became an overnight sensation.

³ www.youtube.com/tayzonday. For a fuller account of Mr. Bahner's story, see <http://www.youtube.com/watch?v=Rs8oCsNAkOM>.

It has been viewed more 50 million times and launched Mr. Bahner's career as a singer and actor.

Anthony Padilla and Ian Hecox,⁴ two California teenagers, posted a video of themselves on YouTube in the site's early days. The video, to their surprise, was widely viewed. They went on to create the Smosh channel, whose videos have been viewed nearly 400 million times.

Brothers Hank and John Green⁵ were estranged until they came together over their common passion for making videos. For a year, they communicated with each other only through YouTube. The 600 videos they've posted have been viewed 75 million times.

II. YOUTUBE HELPS US CHANGE THE WORLD.

Some people think that YouTube is only about entertainment. Many of us, however, are using YouTube to achieve social change.

Barnett Zitron⁶ founded Why Tuesday, an election reform political video blog that has advocated ideas for increasing voter turnout such as weekend or holiday voting, same-day registration and early voting. Mr. Zitron has registered over half a million college students to vote.

Mehdi Saharkhiz⁷ is the son of a prominent Iranian journalist who has been jailed for defending human rights and free speech in Iran. Saharkhiz created a YouTube channel to spread awareness about government human rights abuses in Iran, including his own father's imprisonment and brutal treatment in jail. Given the control of the Iranian government over traditional media, alternative media outlets such as YouTube are an important means of

⁴ www.youtube.com/user/smosh.

⁵ www.youtube.com/vlogbrothers.

⁶ www.youtube.com/user/WhyTuesday.

⁷ www.youtube.com/onlymehdi. For a fuller account of Mr. Saharkhiz's story, *see* <http://www.youtube.com/watch?v=AbKqXt8F8fo>.

spreading information within Iran. Many of the videos that Mr. Saharkhiz posts are from contacts in Iran who record the videos on their cell phones. Mr. Saharkhiz believes his father's fate would be far worse than it is today without the attention created by sites like YouTube.

Phillip de Vellis⁸ believes in the capacity of the internet to change political discourse. Frustrated at candidates who were treating the internet as a forum for conventional television advertising, he created and uploaded to YouTube a video supporting President Obama's candidacy. He hoped it would be viewed by a few thousand people. Instead, millions viewed it and the San Francisco Chronicle described it as "a watershed moment in 21st century media and political advertising."

Salman Khan,⁹ a graduate of Harvard and MIT, quit his hedge fund job to found the non-profit Khan Academy. The Khan Academy makes available more than 1,200 videos that teach you about everything from Calculus to the History of the French Revolution, from Chemistry to Economics. His educational videos have been viewed more than 15 million times by individuals around the world.

Kev Jumba¹⁰ is an Asian-American comedian whose YouTube shows have been enormously popular. He has set up a channel¹¹ whose revenues are contributed to charities such as End Hunger Now.

Our efforts are just a few examples of what thousands of others are doing on YouTube. The following is an account by the President of the World Food Program of a video it posted to raise money:

⁸ www.youtube.com/user/ParkRidge47.

⁹ www.youtube.com/khanacademy.

¹⁰ www.youtube.com/user/kevjumba.

¹¹ www.youtube.com/jumbafund.

In a single weekend, it was viewed over half a million times and raised enough to feed over 140,000 children. We did this by creating a video that was compelling and [put] to use all the bells and whistles offered to non-profit partners: A call-to-action overlay ad, annotations with an external link to a donation form, Google Checkout, as well as a branded channel that gained more than one compliment from visitors.

While this dramatic weekend is one we'll remember at WFP for a long while, the long-term results are interesting. Since then, our video has helped to feed over 650,000 children and we've drawn a steady crowd to our YouTube channel where we have more great content. YouTube is an obvious place for us to share our videos — it's become an outreach tool that is powerful, dynamic, and highly effective for raising both awareness and funds.¹²

YouTube is a tool that can be used for many purposes. Our own experiences and those of others demonstrate that.

III. YOUTUBE HELPS LEVEL THE PLAYING FIELD.

One thing that many of us love about YouTube is that it levels the playing field. Anyone with talent, access to the Internet and a video camera can present his or her ideas.

Ronald Erikson II¹³ is a musician and comedian who posts YouTube videos. He believes that the beauty of YouTube is that everyone is shown together as equals. There are musicians, animators, painters, comedians, kids, adults, inventors, lunatics, politicians, families and superstars all together on a single site.

Cory Williams has created an eclectic series of high quality videos¹⁴ that have been watched tens of millions of times. He notes that his videos have actually been shown without his permission on many conventional outlets such as MTV (which, ironically, is owned by Plaintiff Viacom), Fox, NBC, Warner Bros., CNN, and G4TV. This reflects an imbalance of power between individuals and conventional media outlets. YouTube, however, helps level the playing field.

¹² mashable.com/2010/03/26/non-profits-youtube.

¹³ www.youtube.com/user/hiimrawn.

¹⁴ www.youtube.com/user/smpfilms.

Chris Cunningham¹⁵ (aka Chris Crocker) posted the video “Leave Britney Alone” that became an overnight sensation and led to many commercial opportunities. But what he values most is a newfound sense of freedom and empowerment. He felt voiceless before and now has an opportunity to be heard.

Without YouTube, we would be in a disadvantageous bargaining position due to the gatekeeper role played by a small number of companies who control access to radio stations, television stations, record stores, bookstores and other media outlets. Plaintiffs’ reach is far and wide, with a worldwide network of gates in all types of media activity. In film and television production and distribution, Plaintiffs control Paramount Pictures Corporation, along with Paramount Motion Pictures Group Inc., Paramount Vantage, Paramount Pictures International, MTV Films, Nickelodeon Movie, Paramount Home Entertainment, Republic Pictures, Go Fish Pictures, MTV and its various spin-offs, Nickelodeon and its various spin offs, VH1 and its various spinoffs, CBS Corporation,¹⁶ Showtime, Nick at Nite, TV Land, CMT and its spin offs, SpikeTV, BET and its spin offs, Comedy Central, Centric, Logo, TMF, and Viva.¹⁷ In short, Plaintiffs have control over virtually every platform through which we might want to distribute our works.

Before YouTube, the reality was that you either did business with these companies and on their terms, or you had to look for a different day job, resigning yourself to

¹⁵ www.youtube.com/user/itschriscrocker.

¹⁶ CBS began trading as a separate company on the New York Stock Exchange on January 3, 2006. National Amusements, Inc. through Sumner Redstone, retains majority control of both CBS and Viacom. Thus while CBS is not a plaintiff, where it matters – control over outlets for expression – CBS is under the control of Viacom’s management. According to Wikipedia, National Amusements itself “operates more than 1,500 movie screens across the United States, the United Kingdom, Latin America, and Russia under its Showcase Cinemas, Multiplex Cinemas, Cinema de Lux, and KinoStar brands,” thus controlling the end distribution channel for theatrical movies. en.wikipedia.org/wiki/National_Amusements.

¹⁷ See Viacom’s website, www.viacom.com/ourbrands/brandindex/Pages/default.aspx.

having your creations enjoyed by family and a few friends. Far from leading to a diverse marketplace of ideas and different types of works of authorship, there was an incredible homogeneity of offerings. YouTube in particular and the Internet in general have liberated us and millions of others from gatekeepers like Plaintiffs. We can now be our own television and cable stations and our own record labels and record stores. We suspect that the threat that truly concerns Plaintiffs is not copyright infringement but just competition. As ABC news reported on the fifth anniversary of YouTube:

Jon Ryan Hige, a high school student in Hawaii [] started posting his comedy shtick on YouTube. With more than 2.2 million subscribers – way bigger than the audience of Comedy Central's Jon Stewart – his YouTube channel is the most subscribed of all time.¹⁸

Another example of this competition is Iman Crosson,¹⁹ a member of our coalition. Mr. Crosson, a struggling actor despondent about his career, started posting his comedy sketches on YouTube in 2005. His impersonations of Obama in particular have been successful. A December 3, 2008 article in New York Magazine describes Crosson's popularity:

While Saturday Night Live is reportedly sticking with white comedian Fred Armisen as its Obama, YouTubers are rallying behind an unknown actor who goes by the name of Alphacat as their fauxbama of choice. One of his videos, the "president-elect" singing a parody of T.I.'s "Whatever You Like," has racked up 1.4 million views. Alphacat has also won the admiration of one of the most vocal boosters of the real Obama: the Atlantic's Andrew Sullivan, who judged his impression as "better than Fred Armisen" on his Daily Dish blog.

Alphacat's real name is Iman Crosson, a 26-year-old Dayton, Ohio, native and dance major who started perfecting his Obama impression while working as a waiter in Manhattan. He recently moved to Los Angeles to stake out a career in Hollywood.²⁰

¹⁸ abcnews.go.com/Nightline/Technology/youtube-anniversary/story?id=10607516&page=2

¹⁹ www.youtube.com/alphacat. For a fuller account of Mr. Crosson's story, *see* <http://www.youtube.com/watch?v=GxvPhdHVXe0>.

²⁰ nymag.com/daily/intel/2008/12/meet_alphacat_the_man_who_prov.html.

Others besides those who are members of the Sideshow Coalition have found that there is a conflict between individuals who create content and gatekeepers. The popular recording group OK Go encountered this conflict. OK Go was formed in 1998, and went the traditional route of releasing studio albums, beginning in 2002. Beginning in 2005, the band's popularity was substantially helped by clever, choreographed videos. The band's second album, *Oh No*, had a huge hit, "A Million Ways," thanks to a hilarious video of the song, a video that the group shot itself for \$5 in a backyard.²¹

On July 31, 2006, the band released a video for their song "Here It Goes Again" featuring a complicated choreographed dance on treadmills.²² In the first six days, the video was viewed by over one million people. It has now been viewed over 51 million times, and in 2007 won a Grammy. One would think this success would lead OK Go's record label, EMI, to warmly endorse YouTube, but in fact a dispute arose with embedding YouTube videos. Damian Kulash, the group's lead singer explained in a February 20, 2010 New York Times Op-Ed:

Embedded videos — those hosted by YouTube but streamed on blogs and other Web sites — don't generate any revenue for record companies, so EMI disabled the embedding feature. Now we can't post the YouTube versions of our videos on our own site, nor can our fans post them on theirs. If you want to watch them, you have to do so on YouTube.

But this isn't how the Internet works. Viral content doesn't spread just from primary sources like YouTube or Flickr. Blogs, Web sites and video aggregators serve as cultural curators, daily collecting the items that will interest their audiences the most

The numbers are shocking: When EMI disabled the embedding feature, views of our treadmill video dropped 90 percent, from about 10,000 per day to just over 1,000. Our last royalty statement from the label, which covered six months of streams, shows a whopping \$27.77 credit to our account.²³

²¹ www.youtube.com/watch?v=bav63MWNUKg&feature=channel. For a fuller account of OK Go's story, see <http://www.youtube.com/watch?v=HYNEvZfJP2I>.

²² www.youtube.com/watch?v=pv5zWaTEVkl.

²³ www.nytimes.com/2010/02/20/opinion/20kulash.html.

This dispute was one of the factors that led OK Go to split from EMI in 2010 and to launch its own label. One of the reasons it was possible for OK Go to create its own label is that the Internet and YouTube in particular allow musicians to more easily reach consumers directly. YouTube gives creative professionals more options and levels the playing field for us.

IV. YOUTUBE ENABLED US TO REACH OUR AUDIENCE.

For many of us, YouTube has allowed us to reach an audience for which the conventional media would not have funded programming. For example, Marina Orlova,²⁴ a Russian-born philologist, had the crazy idea that people might voluntarily watch videos on philology. Combining her knowledge of philology and good looks, her videos now teach millions the meaning of words such as Aibohphobia (the fear of palindromes) or the origins of phrases such as “peeping tom,” “pork barrel spending” and “gird your loins.”

Christine Gambito²⁵ is a Filipino-American mother of two who has created the HappySlip channel. Her videos, which are insightful about the experience of being a first-generation American and also highly entertaining, have reached an ethnically mixed audience that has viewed them over 74 million times.

Improv Everywhere²⁶ is a group that stages positive stunts in public places such as its famous No Pants Subway Rides. In 2007, NBC made a television pilot arising from Improv Everywhere’s work but then dropped the project. Through YouTube, however, Improv Everywhere was able to keep presenting its work and earn money to fund that work.

YouTube addresses many topics that would be considered too controversial for conventional media. Popular posts provoke responses and then responses to responses; or

²⁴ www.youtube.com/hotforwords.

²⁵ www.youtube.com/user/happyslip.

²⁶ www.youtube.com/user/improveverywhere.

parodies and then parodies of parodies. YouTube fosters conversations and debates that cannot occur on broadcast television because television is one-way communication.

V. YOUTUBE HELPED US REALIZE OUR DREAMS.

Some of us had dreams of being involved in entertainment. We believed we had something to offer but we needed a means to achieve our dreams. That means turned out to be YouTube and it changed our lives.

Arin Crumley²⁷ could not get conventional financing for a film he wanted to make. He therefore self-produced it and posted it to YouTube, the first time a full length movie had been uploaded to the site. After it was viewed more than a million times, the Independent Film Channel picked it up.

Dane Boedigheimer²⁸ wanted to be a filmmaker since he was 12 years old and would spend hours each day with his parents' 8mm camera. In the conventional media, it would have taken years before he might even have a chance to direct films. However, with YouTube, Boedigheimer was able to create a series called "Really Annoying Orange," whose episodes have been viewed 130 million times.

Michael Buckley²⁹ was doing a little-watched weekly show on public access television when a cousin of his posted a few snippets of the show on YouTube. These posts attracted viewers and Mr. Buckley soon began focusing his efforts on YouTube. He now makes his living creating videos three times a week that have been viewed tens of millions of times.

²⁷ www.youtube.com/user/foureyedmonsters.

²⁸ www.youtube.com/user/realannoyingorange.

²⁹ www.youtube.com/user/whatthebuckshow.

Kassem G³⁰ was in a dead end retail job doing stand up comedy on the weekends. One day, he uploaded a video that many viewed. His videos have now been viewed 60 million times and he makes a living through his YouTube videos.

Dan Zappin had spent years trying unsuccessfully to break into the Hollywood system. He began posting videos he created to YouTube and created the LisaNova channel.³¹ Last year, he banded together with several other top rated YouTube users form Maker Studios.³² In less than a year, Maker Studios has grown to nearly 30 full-time employees. Zappin believes that without YouTube he would be a frustrated artist with no outlet to express his talents.

In addition to helping these people achieve their dreams, YouTube has helped many others, such as Let It Out Entertainment, which is a comedy production team chiefly composed of Paul Telner, Jason Fisher, and Byron Pascoe. Their amusing videos starring Paul have been seen millions of times on YouTube. They used YouTube to help reach their goals, such as getting a show on Canadian television with the MuchMusic TV network, and are continuing to use it for other business opportunities, from online to television. Others who have benefited from YouTube include Kevin Nalty,³³ a father of four who quit a marketing job at a large company to create YouTube videos; Mitchell Davis, whose videos on LiveLavaLive³⁴ have been viewed more than 75 million times; Alli Speed & Charles Trippy,³⁵ an engaged couple who have shared their lives and travels with millions through their YouTube video log; and William Louis Hyde,³⁶ a D.C. resident whose YouTube channel reports on the YouTube community. In

³⁰ www.youtube.com/user/kassemg.

³¹ www.youtube.com/user/lisanova.

³² www.youtube.com/user/thestation.

³³ www.youtube.com/nalts.

³⁴ www.youtube.com/livelavalive.

³⁵ www.youtube.com/user/CTFxC.

³⁶ www.youtube.com/thewillofdc.

some cases, we have worked to help others achieve their dreams on YouTube. Hank Green and Alan Lastufka, a 26 year old musician from Chicago, created DFTBA,³⁷ a record label that signs and promotes YouTube musicians exclusively and has released 25 albums of original music.

VI. THESE LAWSUITS ARE ABOUT US.

We recognize that we are nowhere named in these lawsuits. However, we nonetheless believe that these lawsuits are about us. We didn't start YouTube and we don't own it, but there is nobody that YouTube is more important to than us, individuals whose creative expression has been enabled by YouTube.

We want to retain the features of YouTube that have made it so important to us. Plaintiffs think that the Internet should operate like television. They want YouTube to be liable for anything and everything that someone uploads. We believe that vision is not what Congress had in mind when it enacted the Digital Millennium Copyright Act ("DMCA"). The point of this act was to lead us into the new millennium, not to tether us to the last one.

The DMCA is often described as a compromise between major media companies and online services. But there was another group whose interests needed to be and were protected through the DMCA's passage: us. Congress wanted to make sure that the Internet remained a vibrant platform for free speech by ordinary people. It realized that to do so, it had to shield service providers from liability for materials that users uploaded, lest the services censor user-expression for fear of liability. Barney Frank commented as follows:

We have a problem here of making sure that intellectual property is protected, but we do not want freedom of expression impinged upon....[O]ne of the things that was a potential danger here was that by protecting intellectual property, a very important job, we would have imposed on the on-line service providers such a degree of liability as, in fact, to diminish to some extent the freedom they felt in presenting things.... We have hit a balance which fully protects intellectual property... But at the same time we have done this in a way that will not give the

³⁷ www.youtube.com/user/fallofautumndistro.

people in the business of running the online service entities and running [the] internet, it will not give them either an incentive or an excuse to censor.³⁸

It is pretty clear that on a scale of incentives to censor, the billion dollars that Plaintiffs seek in this lawsuit rates pretty high. If YouTube is made responsible for everything that we say, then naturally YouTube will want to exercise control over what we say. No online service would risk enabling the universe of users to speak in their own words if it faced liability for anything that anyone said.

Therefore, we ask that as the Court decides this case, it consider not just the interests of those who appear in the caption, but also our interests as creative professionals and the interests of the hundreds of millions of people who have viewed our work.

We are not a sideshow. We are what YouTube is all about and what this lawsuit should be about.

CONCLUSION

For the reason stated above, the Sideshow Coalition asks that the Court conclude that the Section 512(c) safe harbor provision does apply in this case.

³⁸ 144 Cong. Rec. H7092 (daily ed. Aug. 4, 1998).

Dated: New York, New York
May 28, 2010

LAW OFFICES OF ERIC J. GRANNIS

A handwritten signature in black ink, reading "Eric J. Grannis". The signature is written in a cursive, flowing style.

By:

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